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Supreme Court of the United States

OCTOBER TERM 1979

No. 79-1702

DAVID W. CARTER, JR.,
Petitioner

v.

CROWN HOSIERY MILLS, INC.,
Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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CROWN HOSIERY MILLS, INC.,

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Respondent Crown Hosiery Mills, Inc. respectfully opposes the petition for a writ of certiorari seeking to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this cause on January 29, 1980.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit

is not reported, but is set out in the petition (hereinafter cited as "P") as Appendix A (P 18-19). The opinion of the United States District Court for the Middle District of North Carolina is also not reported, but is set out in the petition as Appendix B (P 20-26).

JURISDICTION

Petitioner seeks to invoke this Court's jurisdiction under 28 U.S.C. §1254(1). The judgment of the United States Court of Appeals for the Fourth Circuit was entered on January 29, 1980. The petition for a writ of certiorari was filed within 90 days of that date in conformance with 28 U.S.C. §2101(c). The jurisdiction of the United States District Court for the Middle District of North Carolina was invoked pursuant to the Age Discrimination in Employment Act (hereinafter "ADEA"), 29 U.S.C. §626.

QUESTION PRESENTED

Did petitioner's conversation with a representative of the Department of Labor satisfy both the "notice" and the "filing" requirements specified in 29 U.S.C. §626(d)?

STATUTORY PROVISIONS INVOLVED

The following provisions of 29 U.S.C. §626(d), as they existed prior to the 1978 amendment, control this action:

> "No civil action may be commenced by any individual under this section until the individual has given the Secretary not less than sixty days' notice of an intent to file such action. Such notice shall be filed -- "(1) within one hundred and eighty days after the alleged unlawful practice occurred . . . ."

STATEMENT OF THE CASE

As summarized in the petition, the facts leading up to the institution of this action are, for the purposes of respondent's motion for summary judgment,

not disputed. Prior to the institution of this action, respondent had no notice of petitioner's allegations of age discrimination. The procedural history of this case is as follows.

On January 12, 1977, approximately two years and four months after petitioner was discharged by respondent, petitioner filed his Complaint, alleging that respondent had discharged him because of "his more-than-average utilization of benefits provided under the employee group health insurance plan for catastrophic medical expenses incurred for and on behalf of his dependant spouse." Petitioner's wife, the insured under said insurance policy, was not employed by respondent. Respondent denied the allegations of the Complaint and stated that it had discharged petitioner for good and proper cause. Respondent moved for sum-

mary judgment on numerous grounds, supported, where appropriate, by affidavits which remain uncontested by petitioner.

On November 1, 1978, Judge Hiram H. Ward entered summary judgment in favor of respondent on the grounds that petitioner's oral statement to the representative of the Department of Labor did not satisfy either the "notice" requirement or the "filing" requirement of the ADEA, 29 U.S.C. §626(d) (P 22-3). Petitioner appealed and the United States Court of Appeals for the Fourth Circuit affirmed, per curiam, on January 29, 1980, for the reasons stated by the district court (P 18-9).

ARGUMENT

I. THE QUESTION PRESENTED BY THE PETITIONER DOES NOT FULLY EMBRACE THE HOLDING OF THE LOWER COURTS IN THIS ACTION AND, IF ANSWERED, WOULD CONSTITUTE AN ADVISORY OPINION.

The applicable provisions of 29

U.S.C. §626(d) provide that a plaintiff must give the Secretary of Labor "notice of an intent to file [a civil] action," which notice must be filed with 180 days of the alleged discriminatory event. Petitioner seeks to raise only the issue of whether oral notification is a sufficient filing and does not address himself to the adequacy of the content of the notice given by petitioner. However, Judge Ward addressed himself to both issues and quoted extensively from those portions of Reich v. Dow Badische Co., 575 F.2d 363 (2d Cir. 1978), cert. denied, 439 U.S. 1006, which deal exclusively with the adequacy of the content of the notice. (P 22-3). The oral statements involved in Reich are indistinguishable from those made by petitioner. After next discussing the filing requirement, Judge Ward concluded as follows: "This Court finds

Reich v. Dow Badische persuasive and will follow its holding." (P 24) Thus, the district court's holding embraces an issue not raised by petitioner--the adequacy of the content of the notice given. Petitioner's characterization of the notice as "unequivocal" is not supported by the record and the adverse finding regarding the adequacy of petitioner's notice has not been challenged.

II. THE DECISION BELOW DOES NOT CONFLICT WITH THE PRINCIPLES ENUNCIATED IN OSCAR MAYER & CO. V. EVANS FOR THE CONSTRUCTION OF THE ADEA.

As pointed out in Marshall v. Chamberlain Manufacturing Corp., 601 F.2d 100 (3d Cir. 1979), the holdings of Oscar Mayer & Co. v. Evans, 441 U.S. 750 (1979), and Lorillard v. Pons, 434 U.S. 575 (1978), must be read together when interpreting the ADEA, with reference made to the appropriate statute from

which the subject provision is derived rather than exclusively to Title VII (42 U.S.C. §2000e et seq.). Under this Oscar Mayer-Lorillard doctrine, it is not clear that reference to Title VII authority is mandated in this case, as is assumed by petitioner. In Oscar Mayer, the statutory provision at issue was Section 14(b) of the ADEA [29 U.S.C. §633(b)] governing federal-state relations, which section, in the Court's words, is "in haec verba" with section 706(b) of Title VII [42 U.S.C. §2000e-5(c)]. Further, the Court found that the legislative history clearly establishes that Title VII is the source of section 14(b) of the ADEA.

Unlike section 14(b), there are significant differences between the notice and filing provisions of the ADEA and Title VII, even though both are intended to serve the function of prompt investi-

gation and concilation. See, Powell v. Southwestern Bell Telephone Co., 494 F.2d 485 (5th Cir. 1974), contrasting the two provisions. The most obvious difference is the ADEA's requirement (prior to 1978) that there be notice of an intent to file a civil action, 29 U.S.C. §626(d), whereas Title VII simply requires a charge of discrimination. 42 U.S.C. §2000e-5(b). As was concluded in Chamberlain Manufacturing, the private right of action under the ADEA was modeled both on Title VII and on the Fair Labor Standards Act (29 U.S.C. §201, et seq.).

In the absence of any indication that the ADEA notice provision has simply been transplanted from Title VII, the courts in this case properly applied the normal rules of statutory construction (see III and IV, infra). Furthermore, there is no indication in the record that

either the district or circuit court considered Title VII analogies inapplicable or would have reached a different result had they specifically considered such analogies. The other circuit court decisions upon which the courts here relied similarly do not reject the appropriateness of utilizing Title VII analogies. Reich v. Dow Badische Co., supra; Hays v. Republic Steel Corp., 531 F.2d 1307 (5th Cir. 1976); Charlier v. S.C. Johnson & Son, Inc., 556 F.2d 761 (5th Cir. 1977). By their silence, it may be safely assumed that, because of the plain and significant differences in language between the two acts, these courts and the courts in this case simply found such analogies uninstructive. Indeed, the Reich court (anticipating Oscar Mayer) showed no hesitancy to rely on Title VII where the similarly (indeed, near identity) of

language clearly indicates a Congressional purpose to pattern the ADEA directly after Title VII in the area of federal-state relations. 575 F.2d at 367, n. 3.

Finally, it is not clear that an application of Title VII analogies would support the petitioner's contentions in this case: Title VII requires that a charge of discrimination be in writing; if this is the source of the ADEA notice requirement, it could be presumed that a writing was also contemplated by the drafters of the ADEA. The failure of the ADEA to specify "in writing" can more reasonably be attributed to the Congressional intent to discard the oath requirement (which is the context of the Title VII requirement of a "charge in writing") than to an intent to discard the procedural safeguards of a writing, particularly in view of the well estab-

lished principle that a requirement of filing necessarily involves a writing. See IV, infra.

The principles enunciated in Oscar Mayer do not require a different result in this case. The Fourth Circuit's decision was rendered eight months after the Oscar Mayer decision and there is no support in the record for the proposition that it disregarded those principles.

III. THE DECISIONS BELOW ARE IN ACCORD WITH WELL SETTLED PRINCIPLES OF STATUTORY CONSTRUCTION

Contrary to the petitioner's contention, a fair reading of the district court's opinion shows it did not depend on the legislative history of the 1978 amendments to the ADEA, although it did find support there (P 24). Before discussing the amendments, the court first unequivocally held: "This Court finds Reich v. Dow Badische persuasive and will

follow it holding." (P 24). The discussion of subsequent legislation is obiter dictum. Furthermore, it is far from clear that consideration of subsequent legislation is an improper means of divining the original Congressional intent. Many cases have found such subsequent pronouncements to be extremely revealing and in some cases even dispositive*[1], while other cases have attributed little or no weight to the later Congressional declarations.*[2]

The Fourth Circuit affirmed Judge

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*[1] Pipefitters v. United States, 407 U.S. 385, 411-2 (1972); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 380-1 (1969); NLRB v. Bell Aerospace Co., 416 U.S. 267, 275 (1974), Erlenbaugh v. United States, 409 U.S. 239, 243-4 (1972), Souix Tribe of Indians v. United States, 316 U.S. 317, 329-30 (1942) and Great Northern R. Co. v. United States, 315 U.S. 262, 277 (1942).

*[2] SEC v. Capital Gains Research Bureau, 375 U.S. 180, 199-200 (1963) and Oscar Mayer & Co. v. Evans, supra.

Ward on the basis of the cases cited, without mention of the 1978 amendments. In these circumstances, the district court's passing remarks do not constitute "special and important reasons" for granting a writ certiorari.

IV. NO SIGNIFICANT PUBLIC INTEREST WOULD BE SERVED BY PERMITTING ORAL NOTIFICATION TO SATISFY THE FILING REQUIREMENT OF THE ADEA.

The ADEA requires both that notice be given at least sixty days prior to the filing of suit and that notice be filed within 180 days of the alleged discrimination. As the court in Reich stated:

> "There is no policy basis for denying the statutory language its evident meaning. The statute is indeed beneficient, but it enacts it own beneficence on its own terms and those terms are best adhered to, for they are related to the statutory purpose of seeking prompt relief. While the tax cases interpreting what is now 26 U.S.C. §6511, requiring a claim for refund of tax be 'filed' within certain time periods, involve other and more complex considerations,

> they are clear that, although a claim for refund may be informal, it must be a written claim." 575 F.2d at 368-9.

"File" has consistently been interpreted as requiring a writing and such an interpretation has been linked to signficant public policy considerations. United States v. Lombardo, 241 U.S. 73 (1916) (assuring that the act and time of filing do not become disputable facts); Thompson v. Southern Express Co., 147 N.C. 343, 61 S.E. 182 (1908) (written evidence of filing is important where it imposes upon a third party a duty to act); Wrightsman Petroleum Co. v. United States, 35 F.Supp. 86 (Ct. Cl. 1940) (turnover among government personnel heightens the need for a certain, written record); Ritter v. United States, 28 F.2d 265 (3rd Cir. 1928) (the practical difficulty of determining how to "file" an oral claim).

Therefore, it must be presumed that Congress, by including a "filing" requirement, contemplated that a writing would be required.

> "'[W]here words are employed in a statute which had at the time a well-known meaning at common law or in the law of this country they are presumed to have been used in that sense unless the context compels to the contrary.' Standard Oil v. United States, 221 U.S. 1, 59 (1911)." Lorillard v. Pons, 434 U.S. 575, 583 (1978).

In the face of the consistent interpretation of the word "file" and the policy considerations therefor, the petitioner has failed to establish a compelling reason that a writ of certiorari should be granted.

CONCLUSION

Petitioner has completely failed to establish the "special and important reasons" for the granting of a writ of certiorari, as required by Rule 19 of the Supreme Court Rules. Indeed, the Fourth Circuit holding in this case is in accord with all of the other circuits which have considered these issues. Reich v. Dow Badische, Co., supra; Hays v. Republic Steel Corp., supra; Charlier v. S.C. Johnson & Sons, Inc., supra. Finally, the legislative history of the 1978 amendment unequivocally reasserts the requirement of a written statement, thus assuring that the issues raised in this case will not reoccur hereafter. The petition for a writ of certiorari should

be denied.

Respectfully submitted,

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